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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-358

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

COMMERCE TANKERS CORPORATION,

and

VANTAGE STEAMSHIP CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Commerce and Vantage have filed separate briefs in opposition to NMU's petition. These briefs misstate both the petitioner's argument and the authorities on which it rests. This reply will discuss only the more important misconceptions, while avoiding undue repetition of arguments presented in our petition.

I.

Respondents' Contentions Rest on an Obvious Misconception of the *Noerr-Pennington* Doctrine.

1. Respondents would truncate the *Noerr-Pennington* doctrine by limiting it to agreements for the "sole purpose"

of influencing government action (V. br., p. 10; see also C. br., p. 10, n. 9).[1] As we pointed out in our petition (Pet. pp. 16-18, particularly n. 10), *Pennington* plainly forecloses that limitation. It is presumably for that reason that Vantage's brief deals with that case by the simple expedient of not discussing it.[2] Similarly, Commerce's brief relegates *Pennington* to a footnote, n. 9, and then flatly misstates that case.

2. Vantage attempts to avoid the *Noerr-Pennington* principle by urging that the proceeding herein was arbitral, not judicial, and that NMU used the presumption of validity attaching to arbitration awards in order to obtain a judicial injunction (V. br. p. 11). That claim, however, is completely unfounded. Under the arbitration provision in the collective agreement, NMU was compelled to proceed to arbitration as a prerequisite for legal relief. See *Drake Bakeries, Inc.* v. *Bakery & Confectionary Workers, Local 50*, 370 U.S. 254. Before the District Court, the only tribunal empowered to decide the legality of the contractual provision and issue an enforceable decree, NMU did not urge that any presumption of validity attached to the sale and transfer provision.[3] The parties fully understood, and the Court expressly stated, that this issue had not been reached by the arbitrator but was properly before the Court. 325 F. Supp. 360, 363 n. 3. Judge Frankel permitted full exploration of the legal issues[4] and decided them on the merits, without relying on any presumption with respect to the arbitral award.

3. Both respondents persist in the "straw man" argument that misconceives our position and that misled the Court below (C. br. pp. 2 and 12; V. br. p. 14). NMU does not contend that respondents are barred from testing the legality of the disputed contract provision or that NMU is completely immunized against liability for all damages until the disputed provision is invalidated by a court. On the contrary, our petition (Pet. pp. 17-18) recognizes that respondents were entitled to seek declaratory and injunctive relief and were also entitled to recovery of damages resulting from the parties' enforcement of an agreement violative of the Sherman Act, except, however, for *damages resulting from enforcement through constitutionally protected recourse to judicial action*. In this case, the undisturbed findings show that there were no other damages.[5]

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[1] "V. br." refers to Vantage's brief in opposition to the petition. "C. br." refers to Commerce's brief. "Pet." refers to NMU's petition. Numbers followed by "a" refer to page numbers in the Appendix annexed to NMU's petition.

[2] In apparent recognition of the failure of its attempt to escape the *Noerr-Pennington* doctrine, Vantage's brief selectively quotes portions of the *California Motor Transport* opinion dealing with sham legal proceedings and asserts that NMU "abused the judicial and administrative process" (V. br., p. 10). This is a false issue. The decision below did not rest on any such consideration; there was no finding of sham by the District Court, no reference to sham by the Court of Appeals, no evidence to support any such claim; and, apart from the bare, unsupported characterization quoted in this footnote, nothing in respondents' briefs shows any abuse of process.

[3] Indeed, no such presumption exists even when an arbitrator purports to decide questions of public law. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53-54.

[4] Respondents' briefs before Judge Frankel on the legal issues aggregated 76 pages.

[5] Point III and most of Point I of Commerce's brief deal with matters unrelated to this petition. Questions of secondary boycott, for example, are not germane. Both courts below rejected respondents' claims that they had suffered actionable damages under Section 303 of the LMRA, 29 U.S.C. § 187 (18a; 58a-60a). Moreover, contrary to Commerce's contention (C. br. p. 15), *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, did not hold that if the absence of coercion barred recovery of damages for secondary pressures under Section 303, the Sherman Act would necessarily be a basis for such recovery.

II.

In an Apparent Effort to Gloss Over the Clear Conflict Between the Circuits Created by the *Coors* Case, Respondents Misstate the Holding, and Misconstrue the Thrust, of That Case.

Vantage states (V. br. p. 13) that the distributor in *Coors* sought damages solely on the basis of Coors' initiation of legal proceedings. That statement is plainly contrary to fact. A&S urged that Coors' customer and territorial restrictions were illegal under the Sherman Act and sought damages as well as injunctive relief.[6] Indeed, A&S' contention as described by the Court of Appeals—"that Coors' filing and continued prosecution of this suit . . . was a part of its firm and resolute effort to enforce its illegal territorial restrictions" (73a)—strikingly parallels language in the opinion below and in respondents' briefs to this Court (damages resulted from "the execution of the disputed clause and the NMU's determined efforts to enforce it," 14a; see also V. br. p. 2).[7]

Similarly, Commerce's attempt to avoid *Coors* will not withstand analysis. Commerce urges that "the restraint in this case was unlawful; the restraint in *Coors* apparently

[6] Vantage errs in asserting that there were two counterclaims rather than one (67a-68a).

[7] Respondents' pejorative characterization of NMU's conventional petitions for arbitral and judicial relief—"rigid," "uncompromising," "coercive," "ruthless"—cannot obscure the fact that these terms refer only to the invocation of arbitral and judicial processes, nothing more. Respondents' briefs in effect concede that (1) the challenged provision of the collective bargaining agreement was ineffective against Commerce until enforced by the preliminary injunction of the United States District Court, (2) NMU took no steps to secure enforcement except through arbitral and judicial proceedings, and (3) all damages resulted from the preliminary injunction.

lawful" (C. br. p. 12, n. 3). In both cases, however, the Court of Appeals did not decide the legality of the restraint. But in *Coors*, contrary to the instant case, the reviewing court held that, because of the *Noerr-Pennington* doctrine, Coors' successful, good faith "pursuit" of legal remedies could not give rise to recoverable damages, whether or not the restraint was unlawful. In the instant case the Court of Appeals held, however, that if the contract clause was unlawful, then *Noerr-Pennington* did not preclude recovery of damages arising from NMU's "successful pursuit" of injunctive relief, in good faith. Plainly, the two cases are indistinguishable in all material respects and directly conflict on the issue for which review is sought.

CONCLUSION

For the reasons stated above and in NMU's petition, NMU's request for a writ of certiorari should be granted.

Respectfully submitted,

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